

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF:

Desmond Development Co., LLC
59 Pit
Tuscaloosa County, Alabama
NPDES Permit No. AL0076767

ORDER NO. - -WP

FINDINGS

Pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 through 22-22A-16 (2006 Rplc. Vol.), and the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 through 22-22-14 (2006 Rplc. Vol.), the ADEM Administrative Code of Regulations (hereinafter "ADEM Admin. Code r.") promulgated pursuant thereto, and § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342, the Alabama Department of Environmental Management (hereinafter "the Department") makes the following FINDINGS:

1. Desmond Development Co., LLC (hereinafter "Permittee") operates a mining facility known as the 59 Pit (hereinafter "Pit") located in Tuscaloosa County, Alabama. The Pit discharges pollutants from point sources into an unnamed tributary of Banks Creek and groundwater, waters of the State.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code § 22-22A-1 through 22-22A-16 (2006 Rplc. Vol.).

3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the Federal Water Pollution Control Act, 33 U.S.C. § 1251 to 1387. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Water Pollution Control Act, Ala. Code § 22-22-1 through 22-22-14 (2006 Rplc. Vol.).

4. The Department issued National Pollutant Discharge Elimination System (hereinafter "NPDES") Permit Number AL0076767 (hereinafter "Permit") to the Permittee on June 30, 2005, establishing limitations on the discharge of pollutants from point sources,

designated therein as outfalls 001, 002, and 003, into an unnamed tributary of Banks Creek and groundwater, waters of the State. The Permit requires that the Permittee monitor its discharge and submit periodic Discharge Monitoring Reports (hereinafter "DMRs") to the Department describing the results of the monitoring. In addition, the Permit requires that the Permittee maintain in good working order all systems used by the Permittee to achieve compliance with the terms and conditions of the Permit.

5. A Warning Letter was issued to the Permittee on May 14, 2007, describing deficiencies noted during the inspection that was conducted by the Department on April 19, 2007. The Warning Letter required a response from the Permittee within seven days of receipt of the letter.

6. A Notice of Violation was issued to the Permittee on June 5, 2007, for failing to respond to the May 14, 2007, Warning Letter. The Notice of Violation required a response from the Permittee within seven days of receipt of the letter.

7. The Department conducted an inspection of the Pit on June 10, 2008. The inspector noted the following violations and deficiencies:

- The operator had installed a pump in the chert pit to de-water the pit. The discharges from the de-watering process were not sent to a permitted outfall. The discharges were being pumped from the pit to a nearby channel that bypassed outfall 001 and discharged directly into an unnamed tributary of Banks Creek.
- The road to the outfall 002 structure did not have adequate Best Management Practices (hereinafter "BMPs") to prevent run-off into the discharge channel during a rain event.
- Sand/dirt was pushed over the outfall 002 rock spillway. The material had not been seeded or stabilized.
- Excessive amounts of sediment were observed in the outfall 002 discharge channel.
- Stormwater from the dirt road is diverted into the outfall 002 discharge channel which discharges to an unnamed tributary of Banks Creek. The operator had not installed BMPs to prevent sediment from entering the unnamed tributary.
- The inner slope of the dam associated with outfall 003 had not been seeded.

- The Pollution Abatement Plan (hereinafter "PAP") requires the installation of a spillway and floating silt fencing for subsurface withdrawal at all outfalls. Outfall 003 had a pipe, instead of a spillway, installed in addition to not having any silt fencing installed. Outfall 001 also did not have any silt fencing installed.

The inspection report also noted that most of the observations noted during the April 10, 2007 inspection were not addressed by the Permittee.

8. The Department conducted an inspection of the Pit on July 31, 2009. The inspector noted the following violations and deficiencies:

- The inner and outer slopes of the dam associated with outfall 003 was not seeded and had erosion rills.
- BMPs were not implemented between the haul roads and the unnamed tributaries to Banks Creek.
- BMPs were not implemented on the outer face of the dam associated with outfall 003.
- Sediment was observed in the unnamed tributaries to Banks Creek.
- The facility identification could not be located.
- The outfalls did not have a means of subsurface withdrawal.

9. Pursuant to Provision II.A.8.a of the Permit, a discharge from a point source is prohibited until the Permittee submits to the Department a certification by the registered engineer certifying that all such facilities have been designed, constructed, and are able to be operated to discharge within permit effluent limits, in accordance with the permit requirements. All three outfalls have been constructed but not certified.

10. Pursuant to Provision I.B.8.a(1) of the Permit, monitoring results obtained during the previous three months must be summarized for each month on a DMR and submitted to the Department no later than the 28th day of January, April, July, and October of each year. The Permittee has failed to submit any DMRs required by the Permit.

11. Pursuant to Ala. Code § 22-22A-5(18)c (2006 Rplc. Vol.), in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by the Permittee; the economic benefit

that delayed compliance may have conferred upon the Permittee; the nature, extent and degree of success of Permittee's efforts to minimize or mitigate the effects of such violation upon the environment; Permittee's history of previous violations; and the ability of the Permittee to pay such penalty. Any civil penalty assessed pursuant to this authority shall not be less than \$100.00 or exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day that such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATION: In consideration of this factor, the Department noted that the Permittee violated its Permit by failing to implement and maintain BMPs, failing to certify outfalls, failing to submit DMRs, and by discharging through an unpermitted outfall. The Department has no evidence of irreparable harm to the environment or of any threat to the health and safety of the public as a result of the violations stated herein.

B. THE STANDARD OF CARE: In consideration of this factor, the Department noted that the Permittee did not exhibit a standard of care commensurate with applicable regulatory requirements.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: While clearly the Permittee avoided certain costs associated with properly certifying its outfalls, sample collection and analysis needed to prepare its DMRs, properly modifying its permit to address its otherwise unpermitted discharges, and implementing and maintaining appropriate BMPs, the magnitude of these cost savings and resulting economic benefit, if any, is unknown.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: The Department is unaware of any efforts by the Permittee to minimize or mitigate the effects of the violations upon the environment.

E. HISTORY OF PREVIOUS VIOLATIONS: The Permittee has a history of previous violations as noted in the Findings.

F. THE ABILITY TO PAY: The Department reduced the civil penalty by \$25,800.00 to address the Permittee's inability to pay a civil penalty, as determined by the application of the United State Environmental Protection Agency's ABEL enforcement economic model.

G. OTHER FACTORS: Generally, the violations fell into five broad categories of 1) failure to submit DMRs; 2) failure to certify outfalls; 3) failure to implement BMPs; 4) failure to maintain BMPs; and 5) discharging through an unpermitted outfall, which have historically received penalty amounts of 1) \$100.00 - \$500.00 per DMR; 2) \$100.00 - \$750.00 per outfall; 3) \$100.00 - \$2,500.00; 4) \$100.00 - \$500.00; and 5) \$100.00 - \$2,000.00 per discharge.

ORDER

Based on the foregoing FINDINGS and pursuant to Ala. Code §§ 22-22A-10, 22-22A-5(12), 22-22A-5(18), and 22-22-9(i) (2006 Rplc. Vol.), it is hereby ORDERED:

A. That, not later than forty-five days after the issuance of this Order, the Permittee shall pay to the Department a civil penalty in the amount of \$3,000.00 for the violations stated herein.

B. That all penalties due pursuant to this Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

C. That the Permittee shall submit all DMRs with the appropriate non-compliance notification, if applicable.

D. That the Permittee shall have all outfalls certified. The certifications shall be submitted so that they are received by the Department no later than thirty days after the issuance of this Order.

E. That the Permittee shall cease all discharges through unpermitted outfalls and all outfalls that are not certified until such time that the outfalls are certified by a registered engineer as required by Provision II.A.8.a of the Permit.

F. That the Permittee shall submit an Engineering Report that identifies the potential causes of noncompliance and that summarizes an investigation of the changes necessary for the Permittee to implement and achieve compliance with the Permit. The Engineering Report shall be submitted so that it is received by the Department no later than fifteen days after the issuance of this Order. The Engineering Report shall include a schedule for implementation (i.e., a Compliance Plan) of the repairs. At a minimum, the Permittee's Engineering Report must address the need for changes in maintenance and operating procedures, the need for modification of existing treatment works, and the need for new or additional treatment works. The Engineering Report must be prepared by a professional engineer licensed to practice in the State of Alabama. If the Department determines through its review of the submitted Engineering Report that the submittal is not sufficient to accomplish compliance with the Permit, then the Permittee must modify the Engineering Report so that it does accomplish compliance. The Permittee shall submit modifications to the Engineering Report, if required, so that they are received by the Department no later than thirty days after receipt of the Department's comments. The Permittee shall complete implementation of the recommendations made in the Engineering Report no later than 90 days following the issuance of this Order.

G. That, upon the Department's request, the Permittee shall prepare and submit detailed Progress Reports to the Department describing the Permittee's progress towards achieving compliance with the items presented in the Compliance Plan.

H. That this Order shall not affect the Permittee's obligation to comply with any Federal, State, or local laws or regulations.

I. That final approval and issuance of this Order are subject to the requirement that the Department provide notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the proposed Order.

J. That, should any provision of this Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with Federal or

State law and, therefore, unenforceable, the remaining provisions hereof shall remain in full force and effect.

K. That, except as otherwise set forth herein, this Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State or local law, and shall not be construed to waive or relieve the Permittee of its obligations to comply in the future with any permit.

L. That the issuance of this Administrative Order does not preclude the Department from seeking criminal fines or other appropriate sanctions or relief against the Permittee for the violations cited herein.

M. That failure to comply with the provisions of this Administrative Order shall constitute cause for commencement of legal action by the Department against the Permittee for recovery of additional civil penalties, criminal fines, or other appropriate sanctions or relief.

ORDERED and ISSUED this _____ day of _____, _____.

John P. Hagood
Director